

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSEPH GARRETT COSNER
Claimant

VS.

JOHNSON CO. & BOARD OF COMM.
Self-Insured Respondent

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Docket No. 1,013,294

ORDER

Respondent requests review of the January 6, 2005 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard.

ISSUES

The respondent admitted claimant suffered injury to his left knee as the result of an accidental injury on January 6, 2003. But respondent denied claimant suffered a compensable work-related injury to his right knee. The Administrative Law Judge (ALJ) authorized treatment for claimant's right knee. Implicit in the order is a finding that the right knee injury arose out of and in the course of claimant's employment with respondent.

The respondent requests review of whether claimant's need for medical treatment on the right knee was caused by claimant's accidental injury on January 6, 2003. Respondent argues claimant's need for medical treatment for his right knee is due to a severe preexisting degenerative condition which was neither caused nor aggravated by the January 6, 2003 accident.

Initially, claimant argues the respondent's appeal should be dismissed because the Board does not have jurisdiction to review this Order. Claimant notes that the respondent does not deny he suffered accidental injury on January 6, 2003, and the current disagreement is over the nature of medical treatment for that injury. Accordingly, claimant concludes whether the ALJ orders or denies medical treatment is not a jurisdictional issue for appeal to the Board. In the alternative, the claimant argues the injury to the left knee resulted in an antalgic gait which aggravated an asymptomatic preexisting condition in his right knee. Consequently, the claimant requests the Board to affirm the ALJ's Order.

The issues before the Board on review are:

1. Does the Board have jurisdiction to review the January 6, 2005 preliminary hearing Order?
2. If so, was claimant's preexisting right knee condition aggravated, accelerated or intensified as a result of the January 6, 2003 injury to his left knee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a maintenance technician for the Water Department. On January 6, 2003, claimant was working on a water main break when he fell into a 12 foot deep excavation and injured his left knee. Ultimately, surgery was performed on claimant's left knee on February 3, 2003.

While receiving treatment for his left knee as well as after the surgery the claimant altered his gait to favor the injured knee. As a result he began to experience pain in his right knee in August 2003. Claimant testified that because his request for treatment for his right knee was denied he sought treatment with his personal physician, Dr. Brian Kindred.

In 2001, Dr. Brian C. Kindred had performed an arthroscopic ACL reconstruction on claimant's right knee. The doctor's October 6, 2003 office note reflected claimant had not had any significant problems with his right knee since the surgery. The note further reflected that gait abnormality from the left knee injury has led to increasing pain in the right knee. In a letter dated November 19, 2003, Dr. Kindred opined the claimant's preexisting osteoarthritis of the right knee was aggravated because of gait abnormalities caused by claimant's left knee injury.

At his attorney's request, the claimant was examined by Dr. James A. Stuckmeyer on August 26, 2004. Dr. Stuckmeyer opined that as a direct consequence of the left knee injury claimant developed an antalgic gait which exacerbated and aggravated claimant's right knee condition.

Dr. Roger W. Hood examined claimant on November 3, 2004, but did not offer an opinion regarding causation for claimant's right knee problems other than noting claimant had previous surgeries to that knee. Dr. Thomas S. Samuelson examined claimant's left knee on May 24, 2004, and apparently limited his examination and report to claimant's left knee.

The claimant argues the respondent's appeal does not raise a jurisdictional issue for an appeal from a preliminary hearing.

"A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."¹ Whether claimant's condition and present need for medical treatment for his right knee is due to the admitted work-related accident to the left knee or caused by claimant's preexisting condition gives rise to an issue of whether claimant's current condition arose out of and in the course of employment with respondent. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

Respondent argues claimant's need for medical treatment for his right knee is due to a severe preexisting degenerative condition which was neither caused nor aggravated by the January 6, 2003 accidental injury to claimant's left knee. The Board disagrees.

When a primary injury under the Workers Compensation Act arises out of and in the course of the employment every natural consequence that flows from the injury is compensable if it is the direct and natural result of the primary injury.² It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.³

The claimant had previously had surgeries performed on his right knee and had preexisting osteoarthritis in that knee. But the medical records appear to corroborate claimant's testimony that after his last right knee surgery in 2001 he did not have significant problems with that knee. Claimant's right knee condition was relatively asymptomatic until he injured his left knee.

After the left knee injury, claimant developed an antalgic gait which aggravated the right knee. Both Drs. Kindred and Stuckmeyer concluded that as a direct consequence of the left knee injury claimant developed an antalgic gait which exacerbated and aggravated claimant's right knee condition. The claimant has met his burden of proof to establish that as a natural consequence of the injury to his left knee he developed an antalgic gait which aggravated the preexisting osteoarthritis in his right knee. The Board affirms the ALJ's Order.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Steven J. Howard dated January 6, 2005, is affirmed.

¹ K.S.A. 44-534a(a)(2).

² *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, Syl. ¶ 2, 564 P.2d 548 (1977).

³ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

IT IS SO ORDERED.

Dated this 28th day of February 2005.

BOARD MEMBER

c: Michael J. Haight, Attorney for Claimant
Eric T. Lanham, Attorney for Respondent
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director